

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In July 1996, Mr. Medlin began working for Douglas County in its bridge and road department. On November 6, 1996, while breaking concrete with a sledgehammer, Mr. Medlin injured his back.
2. The parties stipulated that Mr. Medlin's back injury arose out of and in the course of his employment with the County. At the time of the accident, Mr. Medlin was 55 years old.
3. The County authorized orthopedic surgeon Dr. Kenneth L. Wertzberger to treat Mr. Medlin. After their first meeting on November 26, 1996, the doctor ordered an MRI, which indicated a herniated disk between the fourth and fifth lumbar vertebrae. After approximately three months of therapy, an epidural injection, and a failed attempt at another injection, the doctor released Mr. Medlin from care. Despite the MRI results and ongoing complaints of pain, Dr. Wertzberger did not believe Mr. Medlin was a surgical candidate because of the lack of leg pain.
4. The parties stipulated that Mr. Medlin has a 14 percent whole body functional impairment as a result of this back injury.
5. After being released by Dr. Wertzberger, Mr. Medlin contacted Douglas County to inquire about returning to work. The County advised him that it did not have any work that he could do.
6. When the County failed to return him to work, Mr. Medlin sought other employment and eventually located a part-time job earning \$6.50 per hour at a convenience store where he stocks coolers, carries out trash, and washes down the driveway. When he started that job in mid-summer 1997, he worked between 21 and 28 hours per week. But when winter weather arrived in November 1997, his hours decreased to 10 to 15 hours per week. When he last testified in April 1998, Mr. Medlin was averaging 13 hours per week at the store.
7. Mr. Medlin also testified in February 1998. At that time he was continuing to look for other employment. Mr. Medlin has limited formal education as he has only completed the ninth grade. And he has not completed a GED. Most of his job contacts have been with construction companies as that is the only type of work that he feels he knows. Although he owned and operated a bar and grill for approximately four years from 1989 to 1993, he does not believe he could work in a fast food restaurant because he is not familiar with computers and he has difficulty hearing and seeing well enough to read.
8. After the February 1998 regular hearing, the County provided Mr. Medlin with some job placement services. Intracorp's Ron H. Combs provided Mr. Medlin with a list of

several potential employers in the Lawrence, Kansas, area engaged in either fast foods, light manufacturing, or security services. By April 1998 Mr. Medlin had contacted those companies without success in obtaining employment. Mr. Combs also provided a list of potential employers in the Johnson County and Kansas City areas. Mr. Medlin did not contact those companies because he lived in Baldwin, Kansas, and he felt those companies were beyond a reasonable commuting range considering the wage he could expect to earn. Also, driving sometimes increases his back pain.

9. In early April 1998, Mr. Medlin worked 4½ hours at a Burger King fast food restaurant putting hamburgers and buns in a broiler. Mr. Medlin testified that he was unable to perform that job because it required him to lean forward repetitively and to twist at the waist. Although the restaurant was willing to try Mr. Medlin frying french fries, he did not return because his back was hurting and he did not believe he could do that job.

10. As a result of this injury, Mr. Medlin has permanent work restrictions and limitations that he should now observe. He should never lift more than 25 pounds or 10 pounds repetitively. Also, he should restrict his bending and twisting to a minimum, or no more than 5 or 6 times an hour.

11. At the time of the November 1996 accident, Mr. Medlin was employed as a seasonal or temporary employee earning \$6 per hour according to Pam Madl, the County's Director of Administrative Services. As a temporary employee, he did not receive fringe benefits.

CONCLUSIONS OF LAW

1. The Award should be modified to reduce the permanent partial general disability from 71 percent to 33 percent.

2. Because Mr. Medlin has a back injury, he is entitled to permanent partial general disability benefits as defined by K.S.A. 1996 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption against work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. Considering a myriad of factors, some of which are Mr. Medlin's age, employment history, education, work restrictions, where he resides, his efforts to find employment, the job placement services provided by the County, the Appeals Board concludes that Mr. Medlin has made a good faith effort to find appropriate employment. Therefore, the actual difference in Mr. Medlin's pre- and post-injury wages should be used for the permanent partial disability formula.

4. The Board concludes that Mr. Medlin's pre-injury average weekly wage is \$240. Although a seasonal employee, Mr. Medlin was hired to work and expected to work 40 or more hours per week. That makes Mr. Medlin a full-time employee for purposes of computing his wages under the Workers Compensation Act.³ Multiplying the \$6 hourly rate by the 40 hours per week Mr. Medlin was expected to work yields a \$240 weekly wage.

5. As indicated above, when Mr. Medlin last testified he was earning \$6.50 per hour and working at the convenience store approximately 13 hours per week. Therefore, the Board finds that Mr. Medlin's post-injury wage for the permanent partial disability formula is \$84.50 per week. Comparing \$84.50 to \$240 yields a 65 percent difference in pre- and post-injury wages.

6. Mr. Medlin has failed to prove either the number or percentage of former work tasks that he is now unable to do as a result of his back injury. The doctors who testified regarding task loss reviewed and relied upon the information prepared by Mr. Medlin's vocational expert, Michael J. Dreiling. But the Board concludes that Mr. Dreiling's task list is neither accurate nor adequately identifies the individual work tasks.

First, Mr. Dreiling completely omitted and failed to list or consider in his analysis at least one of the jobs that Mr. Medlin held in the 15-year period immediately preceding the November 1996 accident. Mr. Medlin testified that he owned and operated his bar and grill from October 1989 to October 1993. When discussing medical treatment that he had received in 1994, he testified that after he closed his bar and grill he did "flatwork" for a

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ K.S.A. 44-511(a)(5).

company. But according to Mr. Dreiling's report, Mr. Medlin was unemployed between the time the bar was closed and when he began work for Douglas County. Mr. Dreiling's omission may be contributed to Mr. Medlin's less-than-perfect memory. Although he first testified that he closed his bar and grill in 1994, he later remembered that he closed his bar in 1993. Therefore, the Board concludes that Mr. Dreiling had an incomplete employment history from which to compile a list of work tasks.

Second, according to the analysis provided by Mr. Dreiling, in the entire 15-year period before the November 1996 accident, Mr. Medlin had only five work tasks that comprised the four jobs that Mr. Dreiling considered. The Board finds that instead of describing and identifying the individual work tasks that comprised Mr. Medlin's former jobs, Mr. Dreiling provided only a general description of the job. Nor did any physician make any independent attempt to identify work tasks, electing instead to wholly rely upon Mr. Dreiling's information and analysis. Therefore, the Board concludes that Mr. Medlin has failed to either obtain from Mr. Dreiling or compile a list of individual work tasks. And without a proper list of individual work tasks, a physician is unable to provide a credible opinion of task loss.

7. The permanent partial disability formula requires the task loss and wage difference to be averaged. Averaging the 65 percent wage difference with zero for the task loss yields a 33 percent permanent partial disability.

AWARD

WHEREFORE, the Appeals Board modifies the June 24, 1998 Award and reduces the permanent partial general disability from 71 percent to 33 percent.

Jerry Medlin is granted compensation from Douglas County Public Works Transportation for a November 6, 1996 accident. Based upon a \$240 average weekly wage, he is entitled to receive \$160.01 per week for 39 weeks of temporary total disability, or \$6,240.39, followed by 129.03 weeks at \$160.01 per week for a 33% permanent partial general disability, or \$20,646.09, making a total award of \$26,886.48. As of April 30, 1999, Mr. Medlin is owed \$20,687.69, less any amounts previously paid. The balance of \$6,198.79 is to be paid at the rate of \$160.01 per week until paid in full.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Eugene C. Riling, Lawrence, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director